UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

POLYCON INDUSTRIES, INC.,	)	
	)	
Petitioner,	)	
	)	
v.	)	Petition for Review
	)	
TEAMSTERS LOCAL UNION NO. 142, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondents.	)	

PETITION FOR REVIEW

Polycon Industries, Inc. (hereinafter "Polycon"), hereby petitions the court for review of the Decision and Order of the National Labor Relations Board (hereinafter "Decision and Order"), in Case 13-CA-104249, affirming the Administrative Law Judge's rulings, findings, and conclusions, and adopting the Administrative Law Judge's recommended Order as modified. The Decision and Order's adopted conclusions concluded that Polycon and Teamsters Local Union No. 142, Affiliated with the International Brotherhood of Teamsters (hereinafter "Teamster Local No. 142") reached a complete agreement on the terms and conditions of an initial collective bargaining agreement; that Polycon violated Section 8(a)(1) and 8(a)(1) of the National Labor Relations Act (hereinafter "NLRA"); and that the filing of a decertification petition by Polycon employees did not warrant an election being held because of the Section 8(a)(1) and 8(a)(5) violations. The National Labor Relations Board ordered Polycon to make employees whole; cease and desist from refusing to execute the initial collective bargaining agreement; interfere with, restrain, or coerce employees in the exercise of rights guaranteed under Section 7 of the NLRA; execute the collective bargaining

agreement; compensate bargaining unit employees for adverse tax consequences, if any; and post a notice marked as Appendix. The NLRB entered its Decision and Order on October 29, 2015.

Respectfully Submitted,

/s/ Steven A. Johnson
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250 East 90th Drive
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following by Certified Mail, this 2nd day of December, 2015:

Paul T. Berkowitz
Paul T. Berkowitz & Associates, Ltd.
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By: /s/ Steven A. Johnson

Polycon Industries, Inc. *and* Teamsters Local Union No. 142, Affiliated with the International Brotherhood of Teamsters. Case 13–CA–104249

October 29, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On November 12, 2013, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Polycon Industries, Inc., Merrillville, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee."

2. Substitute the following for paragraph 2(e).

"Within 14 days after service by the Region, post at its Merrillville, Indiana facility copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by

[1] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In his cross-exceptions, the General Counsel contends that there was no reliable evidence to support the judge's finding that there were 106 employees in the bargaining unit and thus it was never established that the Union actually lost majority support. We find it unnecessary to pass on the General Counsel's cross-exception. Even if the Union lost majority support after May 3, 2013, the date the parties reached a meeting of minds on the terms of a collective-bargaining agreement, the Respondent could not, on that basis, lawfully refuse to execute that agreement. See *YWCA of Western Massachusetts*, 349 NLRB 762, 762–764 (2007).

[2] Members Miscimarra and Hirozawa adopt the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) by refusing to execute, on May 9, 2013, a written contract incorporating the agreement reached by the parties on May 3, 2013.

Member Miscimarra agrees with the judge's rejection of the General Counsel's alternative theory that the parties reached an agreement as early as March 2013, while Member Hirozawa finds it unnecessary to decide whether the violation occurred in March 2013 because, in the unique circumstances of this case, he believes it would not materially affect the remedy.

Chairman Pearce joins his colleagues in affirming the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) of the Act within the meaning of Sec. 8(d) by refusing to execute, at the Union's request, a written contract incorporating the agreement reached by the parties. However, the Chairman would date the violation from March 19, 2013, rather than May 9, 2013. By March 19, the Respondent had failed and refused either to execute a contract embodying the parties' agreement with the Union's proposed modification to the union-security clause or to respond to the Union's proposed modification with its proposal for resolving the issue. Compare *Flying Dutchman Park, Inc.*, 329 NLRB 414, 416, 419 (1999) (requiring employer to execute contract with unlawful provision deleted where employer's refusal to sign the contract was motivated by reasons other than the presence of the unlawful provision), with *Stein Printing Co.*, 204 NLRB 17, 17, 23 (1973) (dismissing allegation that respondent violated Sec. 8(a)(5) by refusing to execute a contract containing an unlawful provision where respondent had at all times offered to sign a contract without the disputed clause).

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language. In adopting the judge's tax compensation and Social Security reporting remedies, we rely on *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014). We shall substitute a new notice to conform to the modified Order, the Board's standard remedial language, and the Board's decision in *Durham School Services*, 360 NLRB No. 85 (2014).

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 9, 2013."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C., October 29, 2015

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to execute a collective-bargaining agreement that embodies the agreement that we and the Union reached on or about May 3, 2013, regarding the terms and conditions of an initial collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request of the Union, forthwith execute the collective-bargaining agreement that the Union submitted to us for signature on or about May 7, 2013, and give retroactive effect to the terms of that agreement to May 1, 2013 (the effective date of the agreement).

WE WILL make bargaining unit employees whole for any losses they have suffered as a result of our failure to sign and effectuate the collective-bargaining agreement, plus interest compounded daily.

WE WILL compensate bargaining unit employees for any adverse tax consequences of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

POLYCON INDUSTRIES, INC.

The Board's decision can be found at www.nlrb.gov/case/13-CA-104249 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Cristina Ortega, Esq., for the General Counsel.
Steven A. Johnson and *Arthur C. Johnson, Esqs.,* for the Respondent.
Paul T. Berkowitz, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEOFFREY CARTER, Administrative Law Judge. This case was tried in Chicago, Illinois, on September 16, 2013. Teamsters Local Union No. 142, affiliated with the International Brotherhood of Teamsters (the Union) filed the charge on May 2, 2013,[1] and the General Counsel issued the complaint on July 19, 2013.

In the complaint, the General Counsel alleges that Polycon Industries, Inc. (Respondent) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by, since on or

[1] All dates are in 2013, unless otherwise indicated.

about May 9, 2013, refusing to execute a written agreement with the terms and conditions of employment that Respondent negotiated with the Union. Respondent filed a timely answer denying the violation alleged in the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Illinois corporation, manufactures bottles at its facility in Merrillville, Indiana, where it annually sells and ships goods valued in excess of $50,000 directly to points outside of the State of Indiana. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Union—Background

Since July 27, 2010, the Union has been the exclusive collective-bargaining representative of the following appropriate bargaining unit:

> All full-time and regular part-time production and warehouse employees employed by [Respondent] at its facility currently located at 8919 Colorado Street, Merrillville, IN; excluding all office clerical employees and guards, professional employees and supervisors as defined in the Act.

(GC Exhs. 1(c), par. V, 1(e), par. V; see also Transcript (Tr.) 18.)

B. Negotiations for a Collective-Bargaining Agreement

1. Early contract negotiations

In October 2010, the Union and Respondent began negotiations for an initial collective-bargaining agreement. Union organizers Harvey Jackson and Les Lis served as members of the Union's negotiating team, while Respondent's vice president/chief financial officer William (Bill) Hansen and Respondent's attorney Steven Johnson handled negotiations for Respondent. (Tr. 17–19, 56–57.) For the most part, negotiations went smoothly, and the parties agreed to contract language in several areas, including a union-security clause that stated as follows:

> The Employer hereby recognizes the Union as the sole and exclusive bargaining agent for all employees covered by the terms and provisions of this Agreement. All present employees who are members of the Union on the effective date of this Agreement shall maintain their membership in good standing in the Union as a condition of their employment. All present employees who are not regular members of the Union shall, on or after the 31st day following the date of the execution of the Agreement, be required to become and remain members in good standing of the Union as a condition of their employment. All employees who are hired hereafter shall be required to become and remain members in good standing of the Union as a condition of their employment from and after the 31st day of their employment or the effective date of this Agreement, whichever is later.

(Joint (Jt.) Exh. 2, art. I, section 2; see also Tr. 27–28.)

2. January 2013—union members vote to ratify a draft contract

On January 5, 2013, Union members voted to ratify a draft version of the collective-bargaining agreement. (Tr. 20; Jt. Exh. 2.) On January 16, the Union sent a copy of the ratified draft contract to Hansen, with the accompanying message "Here is the contract that was voted on hope it is OK. Please let me [know]."[2] (Jt. Exh. 3; Tr. 20, 29–30.)

3. February 2013—the parties agree to correct an error in the draft contract regarding employee vacation time

In February 2013, the parties met to discuss a typographical error in the draft contract regarding employee vacation time. The January 2013 draft contract contained language stating that full-time employees would begin receiving three weeks of paid vacation on "the anniversary of their third year of employment" with Respondent. (Jt. Exh. 2, art. 4, section 3.) The parties agreed that this provision should be corrected to state that full-time employees would begin receiving three weeks of paid vacation on the anniversary of their tenth year of employment with Respondent. (Tr. 20–22; see also Jt. Exh. 7, art. 4, section 3 (draft contract with the corrected vacation language.)

On March 11, Steven Johnson emailed Union organizers Jackson and Lis, as well as Union attorney Paul Berkowitz, to ask the Union to send Respondent a copy of the revised contract before submitting it to the bargaining unit for ratification. As Johnson stated, "Bill [Hansen] and I will need one final review before we 'sign off' on your submission which should guarantee that we are all on the same page." (Jt. Exh. 4; Tr. 30–31.)

4. Respondent raises concerns about the union-security clause

On March 12, before the Union responded to his March 11 email, Johnson contacted the Union to express his concern about the union-security clause in the revised contract. Johnson stated as follows:

> Good morning,
>
> Because of the length of time taken in bargaining, it may be that the union security clause need[s] to be reviewed so as to be in compliance with the Indiana Right to Work statute.[3] I'll take a look when you email your final draft.
>
> Wanted to bring this up now, so that you don't have to vote the contract a third time, inasmuch as you wouldn't want to sign a document not in compliance with the law, and certainly we wouldn't sign either.

---

[2] The Union's decision to vote on the draft contract in January 2013 was premature because, in contrast to the Union's normal practice, the Union did not send a copy of the draft contract to Respondent for review before holding the ratification vote. (Tr. 28–29.)

[3] The Indiana right-to-work statute took effect on March 15, 2012. (Tr. 23–24.)

(Jt. Exh. 5; Tr. 31–32.) Subsequently, the Union sent Respondent two drafts of the revised contract that contained the corrected employee vacation language, but did not contain any new language regarding the union-security clause.[4] (Jt. Exhs. 6–7; Tr. 21–22, 32–34.)

Later on March 12, the Union responded to Johnson's email about the union-security clause by sending a proposed memorandum of understanding. The memorandum of understanding stated that the union-security clause in the collective-bargaining agreement would have no force or effect while the Indiana right-to-work law was in effect, but also stated that should the right-to-work law be nullified, invalidated or repealed, then the union-security clause would become effective to the full extent permitted by law. (Jt. Exh. 8; Tr. 34.)

On March 19, Johnson emailed the Union to respond to the memorandum of understanding that the Union proposed. Johnson rejected the proposed memorandum, explaining his rationale as follows:

> Have received and reviewed the union security language. Thanks for sending. I'm sure you understand that we will not execute a contract that, on its face, violates state law. If you have better language, we'll be happy to take a look. If not, I have language.

(Jt. Exh. 9; see also Tr. 35.) The Union responded later that day by proposing that the parties add contract language at the beginning of the union-security clause to state that the union-security clause "will be enforced to the extent allowed by law." The Union also encouraged Respondent to send alternative language if it wished to do so. (Jt. Exh. 10; Tr. 36.)

5. March 23—Union members ratify draft contract with corrected vacation language

On March 23, the Union held a ratification vote on the draft contract that included the corrected employee vacation language, but also contained the union-security clause language that Respondent previously deemed objectionable. Before conducting the vote, however, the Union did advise the bargaining unit that the union-security clause would be changed in light of the new right-to-work law, and that the change to that clause would not have an economic impact. Union members thereafter voted to ratify the revised draft contract. (Tr. 22, 36; see also Jt. Exh. 7 (version of contract that Union members ratified on March 23).)

6. March 25 through May 1—the parties continue discussions about the union-security clause

On March 25, the Union (via Jackson) emailed Respondent a "final" draft of the contract that included the Union's proposed language that the union-security clause would only be enforced to the extent allowed by law. Jackson asked Respondent to send him any language changes or corrections that were not reflected in the draft. (Jt. Exh. 10; see also Jt. Exh. 10A (March 25 draft contract); Tr. 38.) At trial, Jackson acknowledged that the parties had not yet reached an agreement about the union-security clause and how it should be modified to account for the right-to-work statute. (Tr. 37.)

Upon receiving no response to his March 25 email, on April 25, Jackson sent a follow-up email to Respondent to ascertain Respondent's position on the union-security clause. Jackson stated as follows in his April 25 email:

> I have not received the language you said you would send. Please contact me to resolve this LAST issue. We will also need to talk about changing the date the contract takes effect. I had no idea to get the simple language done it would take so long.

(Jt. Exh. 10; Tr. 25, 37.) Jackson also contacted Union attorney Paul Berkowitz for assistance. (Tr. 26, 39.)

On April 30, Berkowitz sent Johnson a letter to notify him that the Union planned to file an NLRB charge against Respondent unless Respondent signed the collective-bargaining agreement that Union members ratified on March 23. Berkowitz provided the following rationale for the Union's anticipated charge:

> Dear Steve:
>
> Barring your client's signing the agreed upon Collective Bargaining Agreement (ratified by the Union membership on March 23, 2013 with the Company being notified shortly thereafter of the approval of the Contract), my client will be filing the attached 8(a)(5) NLRB Charge due to Polycon's failure to sign the parties' agreed upon Collective Bargaining Agreement.
>
> I understand the confusion over the "Union Security Clause" which <u>both</u> parties agreed to in the ratified Collective Bargaining Agreement. However, the need to renegotiate Article 1–Section 2 due to Indiana's adoption of its Right to Work statute is subject to Article 23. Thus, it is not a legal basis for the Company's refusing to sign the Contract.
>
> As we both know, Article 23 is entitled "Separability and Savings Clause" and states as follows:
>
> > **Section 1.** If any Article or Section of the Contract or of any attachments thereto should be held invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any Article or Section would be restrained by such tribunal pending a final determination as to its validity, the remainder of this Contract and [or] any attachments [] shall not be affected thereby.
> >
> > **Section 2.** In the event that any Article or Section is held invalid or enforcement thereof or compliance therewith has been restrained, as above set forth, the parties shall enter into immediate collective bargaining negotiations, upon the request of the Union, for the purpose of arriving at a mutually satisfactory replacement.
>
> Pursuant to Section 2 of Article 23, Local 142 Business Representative Harvey Jackson has already provided you with the Union's proposed language for a satisfactory replacement of

[4] The Union administrative assistant that sent the revised contracts was not copied on Johnson's March 12 email about the union-security clause. Thus, Johnson's March 12 email simply crossed in cyberspace with the Union's March 12 emails with the revised contracts that corrected the employee vacation language. (Tr. 21–22, 32–34.)

> the Union Security provision. You acknowledged receipt on March 19, 2013, but have failed to respond to the requests to negotiate said language or to simply accept it. Thus, this letter constitutes the Union's grievance against Polycon for its failure to follow the contractually required procedure set forth in Article 23, Section 2. Please let me know at which Step of the grievance procedure the Company wishes to begin the process. The Union suggests immediately going to Arbitration. If the Company refuses to participate in the grievance procedure, then, the Union will amend its Charge to include a unilateral change of the Collective Bargaining Agreement.
>
> Whether [intentionally] or not, a basically administrative task is being turned into a road block which is leading into at least one and potentially two Charges being filed against Polycon. It would make a lot more sense to all concerned if the Company simply accepts the Union's proposed replacement language or at least responds with a counter proposal. But in either event, your client is legally required to sign the agreed upon Collective Bargaining Agreement.
>
> As noted as [sic] the beginning of this letter, the refusal to sign the Collective Bargaining Agreement will result in the attached Charge being filed at the end of the day tomorrow, May 1, 2013, unless you notify this Office that your client is in fact signing the Collective Bargaining Agreement. At the same time, I would appreciate your telling us where you stand on the Union's proposed replacement language.

(Jt. Exh. 12.)

Later on April 30, Johnson advised Berkowitz that "if you feel the need to file the charge, please do so. The employer might want to determine how the full Board and 7th Circuit come down on whether a union and the Board can compel an employer to execute an Agreement that contains language that violates a state's valid right-to-work law. That said, I'll take a look [at Jackson's proposed language] tomorrow, and if you file, we can deal with that in the future." (Jt. Exh. 13.)

On May 1, Johnson sent Berkowitz proposed union-security clause language that Respondent believed would comply with the Indiana right-to-work statute.[5] Johnson requested that Berkowitz incorporate the proposed language into the agreement and then send the revised contract to Respondent for review and signature. (Jt. Exh. 14.)

7. May 2—the Union files its NLRB charge and employees begin circulating a decertification petition

Berkowitz replied to Respondent's proposed union-security clause language on May 2 with an email that stated:

> Hi Steve
>
> My client will be filing the NLRB Charge against Polycon for its illegal refusal to sign the collective-bargaining agreement.
>
> Now that we have begun negotiations in an attempt to arrive at a mutually satisfactory replacement for the Union Security Clause, the Charge will not include an allegation of the company's illegal and unilateral attempt to modify Article 23 of the contract.
>
> On that note, I can tell you that your proposed replacement, Section 2 is rejected. My client's counter-proposal is that Article 1 be retitled "Recognition" and that the following sentence be added between the first and second sentences of the current Section 2.
>
> > The parties recognize that Indiana has recently adopted a Right-To-Work statute and thus the following three sentences are of no force or effect and will not be implemented so long as the Indiana Right-To-Work statute remains in effect.
>
> Please let me hear from you.
> Paul

(Jt. Exh. 15, p. 3; see also GC Exh. 1(a) (NLRB charge in this case filed on May 2).)

Also on May 2, some of Respondent's employees began circulating a decertification petition.[6] The employees that signed the petition asserted that we "do not want to join Local 142 and refuse to pay dues to same." Twenty-one (21) employees signed the decertification petition on May 2. (Jt. Exh. 17.)

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[5] Respondent's proposed union-security clause language stated as follows:

> Employees have a certain rights to Union membership as covered by the National Labor Relations Act. For the purposes of this section, an employee shall be considered to be a member of the Union if he timely tenders the dues required for purposes of representation.
>
> The Employer will grant the Union an opportunity during the orientation of new employees to present the benefits of Union membership, at which time the Union may give such employees a copy of the agreement between the Union and the Employer. For this purpose, the Employer shall notify the designated Union representative of the starting date of new employees within thirty (30) days of their start date.
>
> Employees covered by this Agreement are not required to become or remain a member of the Union. Employees covered by this Agreement are not required to pay dues, fees, assessments, or other charges of any kind or amount to a labor organization. Employees covered by this Agreement may choose to undertake any of the aforementioned activities; however, said choice is the employee's and employee's alone. The aforementioned activities are not conditions of employment or necessary for the continuation of employment. Neither the Employer nor the Union will threaten, coerce, or in any manner attempt to sway an employee's choice to undertake or not undertake any of the aforementioned activities . . . .
>
> The Employer and Union agree that a covered employee may change his decision in regard to the aforementioned activities at any time, and said decision [has] no effect on the employee's continuation of employment or any condition of employment. Upon notifying the Employer or Union of his changed decision, the Employer and the Union shall honor that decision.

(Jt. Exh. 14, page 2.)

[6] Certain employees began expressing their unhappiness with the Union in late April. For example, employee Michael Phipps began researching how to start a decertification petition after he attended a Union meeting in late April. (Tr. 51–54.) Similarly, at shift meetings in late April, Hansen fielded questions from a few employees about how they might go about getting rid of the Union. (Tr. 65.)

8. May 3—The parties agree to revised union-security clause language

On May 3, Johnson emailed Berkowitz and agreed to the Union's May 2 proposal regarding the union-security clause language for the contract. Johnson stated:

> Paul,
>
> Good talking with you yesterday. Your proposed language is fine. I think you intended that the proposed language be placed between the first and second paragraphs (not sentences), as it makes no sense otherwise. That being the case:
>
> 1. Let's have the contract start date be May 1, 2013.
> 2. Because of the problems regarding language, in addition to signing the agreement, we should initial and date each page, thereby assuring that the copies distributed in the future are what was signed, and not a printed copy of an earlier version.
>
> If that acceptable [sic], please have the CBA revised and sent; I will review and, assuming that it is consistent with our agreement, forward to the client for signing.
>
> Regards,
> Steve

(Jt. Exh. 15, page 2.)

In response to Johnson's email, on May 7, Berkowitz emailed Johnson a copy of the revised contract for review and signature. Berkowitz included the following notes about the revised draft:

> I have inserted the agreed upon sentence into Article 1, Section 2 of the contract. In re-reviewing the document, it seems to me that the current second sentence in Section 2 which states "Said authorization shall be in compliance with all applicable Federal and State Language" makes more sense being placed as the second sentence in Section 3. If you disagree with the movement of that sentence, then the Union will agree to your position. However, our request is not substantive other than to say we will comply with the law.
>
> Please review the entire contract. I obviously have no objection to your request that each page be initialed and dated. If you and your client can do so, [] you can have your client sign off on the signature page at the end of the contract, and get the document to my Office, I will have Les and Harvey do the same and return a completely executed contract to you.

(Jt. Exh. 15, pp. 1–2; see also Jt. Exh. 16, art. 1, section 2 (May 7 draft contract that incorporated the union-security clause language that the parties agreed upon on May 3); Jt. Exh. 15, p. 1 (May 8 email that Berkowitz sent to Johnson to follow up with Respondent about signing the contract).)

9. May 9—Respondent notifies the Union that it will not sign the contract

On May 9, Johnson emailed Berkowitz to notify him that Respondent would not be signing the collective-bargaining agreement. Johnson offered the following explanation for Respondent's decision:

> Hi Paul,
>
> . . . In checking my emails from the last several days, I found yours. I wanted to review the contract you sent before sending to the client; I gave the client a call.
>
> I am advised, and as you are probably aware, the employees have contacted the Board regarding a [decertification petition]; I am advised that most employees signed a petition, perhaps 60.[7]
>
> I am not going to review the document, nor send the document to the client for review and signature until I have some idea what's going on. At least at this point, it appears that [the Union] does not enjoy the support of a majority of the Polycon workforce, and if that's the case, the Board can guide us through the appropriate steps.
>
> Regards,
> Steve

(Jt. Exh. 15, p.1.)

10. Decertification petitions filed

On May 22, employee Michael Phipps filed a decertification petition with the Board. There were 106 employees in the bargaining unit when Phipps filed the petition. (Jt. Exh. 18, p. 1; see also Tr. 53–54.) The Board notified Respondent that the petition had been filed. (Jt. Exh. 18, pages 2–8.)

Respondent, in turn, filed an "RM" petition on June 20 regarding the Union's representation of the bargaining unit. There were 98 employees in the bargaining unit when Respondent filed its petition. (Jt. Exh. 19, p. 1.)

DISCUSSION AND ANALYSIS

A. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Relco Locomotives, Inc.*, 358 NLRB No. 37, slip op. at 12 (2012), enfd. ___ F.3d ___, 2013 WL 4420775 (8th Cir. 2013); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an ALJ may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but

[7] As of May 3, forty-two (42) employees had signed and dated the decertification petition. That number rose to forty-nine (49) employees by May 6. An additional eleven (11) employees signed the petition, but there is no evidence (such as a date next to their signature) that establishes precisely when they did so. (Jt. Exh. 17.) As of May 22, there were 106 employees in the bargaining unit. (Jt. Exh. 18, p. 1.)

Respondent (through Hansen) was aware that a decertification petition was being circulated in early May because some employees brought individual pages of the petition (but not the entire petition) to his attention. (Tr. 66.)

not all, of a witness' testimony. *Relco Locomotives,* 358 NLRB No. 37, slip op. at 12.

In this case, credibility is generally not at issue because the majority of the testimony that witnesses provided was unrebutted and was corroborated by documentation that was admitted into evidence. The Findings of Fact accordingly incorporate the testimony of all of the witnesses who testified at trial, to the extent that their testimony was based on their personal knowledge and was corroborated by other evidence. To the extent that credibility issues did arise, I have stated my credibility findings in the Findings of Fact above.

B. Is Respondent Obligated to Execute the Contract?

It is well settled that the obligation in Section 8(d) of the Act to bargain collectively requires either party, upon the request of the other party, to execute a written contract incorporating an agreement reached during negotiations. However, this obligation arises only if the parties had a "meeting of the minds" on all substantive issues and material terms of the agreement. The General Counsel bears the burden of showing not only that the parties had the requisite "meeting of the minds," but also that the document which the respondent refused to execute accurately reflected that agreement. If it is determined that an agreement was reached, a party's refusal to execute the agreement is a violation of the Act. *Windward Teachers Assn.*, 346 NLRB 1148, 1150 (2006).

A "meeting of the minds" in contract law is based on the objective terms of the contract rather than on the parties' subjective understanding of the terms. Thus, subjective understandings (or misunderstandings) of the meaning of terms that have been agreed to are irrelevant, provided that the terms themselves are unambiguous when judged by a reasonable standard. When the terms of a contract are ambiguous, and the parties attach different meanings to the ambiguous terms, a "meeting of the minds" is not established. *Hempstead Park Nursing Home*, 341 NLRB 321, 322 (2004); see also *Windward Teachers Assn.*, 346 NLRB at 1150.

1. The parties reach a meeting of the minds about contract terms on May 3

As established in the evidentiary record, the parties began contract negotiations in October 2010. It is undisputed that after an extended period of negotiations, by early 2013 the parties had reached an agreement on all but two issues: (a) correcting a typographic error in Article 4, Section 3 of the contract regarding employee vacation time; and (b) modifying the union-security clause language in Article 1, Section 2 of the contract to be consistent with the Indiana right-to-work statute that took effect in 2012. (Findings of Fact (FOF) Section II(B)(1)–(4).) The parties agreed on revised language for Article 4, Section 3 (employee vacation time) by March 2013, leaving the union-security clause language as the only remaining issue on the table. (FOF, Section II(B)(3)–(4).)

Initially, the parties volleyed proposals back and forth about the union-security clause. (See FOF, Section II(B)(4), (6).) I find, however, that the parties reached an agreement about revised union-security clause language on May 3, when Respondent's attorney Steven Johnson notified the Union's attorney Paul Berkowitz that Respondent would accept the union-security clause language that the Union proposed on May 2. Indeed, Johnson explicitly told Berkowitz on May 3 that the Union's May 2 proposed union-security clause language was "fine," and went on to ask Berkowitz to prepare the contract for review and signature.[8] I also find that the written contract that the Union sent to Respondent on May 7 was fully consistent with the agreement that the parties reached on May 3.[9] (FOF, Section II(B)(8).)

In light of the foregoing facts, I find that on May 3, 2013, the parties reached a meeting of the minds on all substantive issues and material terms of a collective-bargaining agreement.[10]

[8] I have considered the fact that when Berkowitz sent Johnson the final contract on May 7, Berkowitz proposed moving a sentence from Article 1, Section 2 to Article 1, Section 3. I do not find, however, that Berkowitz's proposal reopened the parties' negotiations or rendered the May 3 agreement invalid. To the contrary, Berkowitz clearly stated that the Union would abandon the proposed change if Respondent requested that it do so. (See FOF, Section II(B)(8); see also *Teamsters Local 771 (Ready-Mixed Concrete)*, 357 NLRB No. 173, slip op. at 6 (2011) (recognizing that efforts to modify contract terms after an agreement has been reached do not change the fact that the original agreement is a binding and enforceable contract).)

[9] I note that the parties did not make ratification of the contract by Union members a condition precedent to an agreement. As the Board has explained, nothing in the Act imposes an obligation on statutory bargaining agents to obtain employee ratification before making a final and binding agreement. Instead, employee ratification becomes a condition precedent to the formation of a contract only when the parties have reached an express agreement to that effect. Where there is such an express bilateral agreement, the Board holds that a contract cannot become effective until ratification occurs. *Teamsters Local 287 (Granite Rock Co.)*, 347 NLRB 339, 339 (2006), enfd. 293 Fed.Appx. 518 (9th Cir. 2008). Conversely, if employee ratification is a step that the union imposed on itself (as part of its internal procedures), an employer may not refuse to sign an otherwise agreed-upon contract because of nonratification. *Personal Optics*, 342 NLRB 958, 961–962 (2004), enfd. 165 Fed.Appx. 1 (D.C. Cir. 2005).

In this case, the evidentiary record does not establish that the parties made an express bilateral agreement that employee ratification would be a condition precedent to a final and binding agreement. The limited record on this point shows that on January 5 and March 23, the Union held ratification votes on draft agreements that the parties negotiated. Although the Union's ratification votes were arguably premature insofar as they occurred before Respondent agreed that all contract language was acceptable, the mere fact that the Union was eager to conduct ratification votes falls well short of establishing that the parties expressly agreed to make ratification a condition precedent to a binding agreement. (FOF, Sec.II(B)(2), (4)–(5).) Moreover, the evidentiary record does not otherwise show (via testimony or documentation) that the parties expressly agreed to make employee ratification an essential step before an agreement could be finalized. Accordingly, I find that the parties did not make employee ratification a condition precedent to their being able to reach a binding and final agreement on contract terms. See *Personal Optics*, 342 NLRB at 962 (finding that the parties did not make ratification a condition precedent to an agreement, and noting that no testimony or written documents supported a conclusion to the contrary); *Teamsters Local 662 (W.S. Darley & Co.)*, 339 NLRB 893, 898 (2003) (finding that the parties did not make ratification a condition precedent to an agreement), enfd. 368 F.3d 741 (7th Cir. 2004).

[10] In its brief, the General Counsel argued (in part) that the parties reached an agreement as early as March 11, when the parties corrected the typographical error in the contract regarding employee vacation

Thus, Respondent was obligated to execute the May 7 contract that reflected the parties' May 3 agreement.

2. The employee decertification petition did not relieve Respondent of its obligation to execute the contract

Respondent asserts that it could not execute the contract because the Union lost the support of a majority of employees in the bargaining unit before the parties agreed to contract terms. See *North Bros. Ford, Inc.*, 220 NLRB 1021, 1022 (1975) (noting that in some appropriate circumstances, an employer may lawfully refuse to bargain with a union because the union has lost the support of a majority of bargaining unit employees). This argument fails because the facts here do not support Respondent's argument.

As I have found, the parties agreed on contract terms (specifically regarding the union-security clause, which was the last remaining clause in play) on May 3. (FOF, Section II(B)(8).) At that time, the decertification petition had only just begun circulating, and had not been signed by a majority of employees in the bargaining unit. (FOF, section II(B)(7), (9) (as of May 3, 42 out of 106 unit employees had signed and dated the decertification petition).) In light of that sequence of events, where Respondent agreed to contract terms and then subsequently questioned whether the Union lost the support of a majority of employees in the bargaining unit, Respondent was obligated to execute the contract that it agreed to, and violated Section 8(a)(5) and (1) of the Act when it refused to do so.[11] See *YWCA of Western Massachusetts*, 349 NLRB 762, 763 (2007) (employer was obligated to execute the contract that it agreed to 23 days before it raised questions about whether the union had the support of a majority of bargaining unit employees); *Mount Airy Psychiatric Center*, 230 NLRB 668, 679 (1977) (same, where employer agreed to contract terms 12 days before it raised questions about whether the union had sufficient support in the bargaining unit); *North Bros. Ford, Inc.*, 220 NLRB at 1022 (same, where employer agreed to contract terms 16 days before bargaining unit employees filed a decertification petition).

In sum, I find that Respondent violated Section 8(a)(5) and (1) of the Act when, on or about May 9, it failed and refused to execute a collective-bargaining agreement that embodied the terms of its May 3 agreement with the Union.[12]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Since July 27, 2010, the Union has been the exclusive collective-bargaining representative of the employees in the bargaining unit.
4. On May 3, 2013, Respondent and the Union reached a complete agreement on the terms and conditions of an initial collective-bargaining agreement.
5. By refusing, since on or about May 9, 2013, to execute a collective-bargaining agreement that embodies the terms of the May 3 agreement between Respondent and the Union, Respondent violated Section 8(a)(5) and (1) of the Act.
6. The unfair labor practices stated in conclusion of law 5, above, affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to execute a collective-bargaining agreement embodying the May 3, 2013 agreement that it reached with the Union, I shall order Respondent to execute and implement the agreement and give retroactive effect to its terms. I shall also order Respondent to make bargaining unit employees whole for any losses attributable to Respondent's failure to execute the agreement, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*,, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

For all backpay required herein, Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate affected bargaining unit employees for the adverse tax consequences, if any, of receiving one or more lump-sum

time. (See GC Br. at 15–17.) Since the Board has recognized that an employer is not obligated to sign a contract that contains an illegal provision (see, e.g., *Flying Dutchman Park, Inc.*, 329 NLRB 414, 416 & fn. 6 (1999)), Respondent arguably was within its rights to insist (as it did on March 12, see FOF section II(B)(4)) that the parties resolve its concerns about the apparent conflict between the union-security clause in the contract and the relatively new Indiana right-to-work statute. As the evidentiary record demonstrates, however, the parties agreed to correct the objectionable union-security clause language on May 3, thereby precluding Respondent from asserting that its subsequent (May 9) refusal to execute a written contract was justified because the contract contained an illegal provision.

[11] Put another way, as soon as Respondent and the Union agreed to contract terms on May 3, the Union was entitled to an irrebuttable presumption during the term of the collective-bargaining agreement (lasting up to 3 years) that it enjoyed the support of a majority of bargaining unit employees. *Auciello Iron Works*, 517 US 781, 785 (1996).

[12] In an effort to avoid the conclusion that I have reached here, Respondent relies heavily on the Seventh Circuit's decision in *Chicago Tribune Co. v. NLRB*, 965 F.2d 244 (1992), but Respondent's reliance on that decision is misplaced. (See R. Br. at 8–9.) In *Chicago Tribune*, the Seventh Circuit addressed a unique set of facts in which the union lost the support of a majority of employees in the bargaining unit long before the employer renewed its contract offer and the union accepted the offer. See *Chicago Tribune Co. v. NLRB*, 965 F.2d 244, 249–250 (1992). The facts in the *Chicago Tribune* case bear no resemblance to the facts at issue here. Moreover, I am bound to follow the Board's decisions, which (as discussed herein) clearly establish that Respondent violated the Act when it refused to execute a written contract that embodied the terms of the agreement that it reached with the Union on May 3 (before the Union lost the support of a majority of bargaining unit employees (if at all)).

backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

Respondent, Polycon Industries, Merrillville, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to execute a collective-bargaining agreement that embodies the agreement that Respondent and the Union reached on or about May 3, 2013, regarding the terms and conditions of an initial collective-bargaining agreement.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request of the Union, forthwith execute the collective-bargaining agreement that the Union submitted to Respondent for signature on or about May 7, 2013, and give retroactive effect to the terms of that agreement to May 1, 2013 (the effective date of the agreement).

(b) Make bargaining unit employees whole for any losses they have suffered as a result of Respondent's failure to sign and effectuate the agreement, plus daily compound interest, as set forth in the remedy section of this decision.

(c) Compensate bargaining unit employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards covering periods longer than 1 year, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each unit employee.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Merrillville, Indiana, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notice shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 12, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to execute a collective-bargaining agreement that embodies the agreement that we and the Union reached on or about May 3, 2013, regarding the terms and conditions of an initial collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request of the Union, forthwith execute the collective-bargaining agreement that the Union submitted to us for signature on or about May 7, 2013, and give retroactive effect to the terms of that agreement to May 1, 2013 (the effective date of the agreement).

WE WILL make bargaining unit employees whole for any losses they have suffered as a result of our failure to sign and effectuate the collective-bargaining agreement, plus interest compounded daily.

WE WILL compensate bargaining unit employees for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters for each bargaining unit employee.

POLYCON INDUSTRIES, INC.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."